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P.V.

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Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 5

HARRY H. NEUBERGER, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 21, 1939.

CERTIORARI GRANTED MAY 27, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 5

HARRY H. NEUBERGER, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Docket Entries.

Docket No. 78919. 1

HARRY H. NEUBERGER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES: 2

For Taxpayer: WALTER MENDELSOHN, ESQ., WILBER H. FRIEDMAN, ESQ.

For Comm'r: J. R. JOHNSTON, ESQ.

DOCKET ENTRIES.

1935

Mar. 28—Petition received and filed. Taxpayer notified. (Fee paid.)

" 28—Copy of petition served on General Counsel.

Apr. 26—Answer filed by General Counsel.

May 2—Copy of answer served on taxpayer.

Dec. 30—Hearing set Feb. 3, 1936. 3

1936

Jan. 10—Motion to transfer to the Reserve Calendar or to transfer to the New York Circuit Calendar filed by taxpayer. 1/13/36 granted and continued to May 4, 1936.

" 29—Notice of change of hearing to April 30, 1936.

Apr. 23—Motion to transfer to the Reserve Calendar or to transfer to the New York Circuit Calendar filed by taxpayer. 4/24/36 granted.

Dec. 17—Hearing set week of Feb. 15, 1937 at New York, N. Y.

Docket Entries.

4 1937

Feb. 15—Hearing had before Mr. Arnold. Submitted. Stipulation of facts and amended petition filed. Petitioner's brief due 3/31/37—respondent's 4/30/37—petitioner's reply 5/15/37.

Mar. 31—Brief filed by taxpayer. 3/31/37 copy served.

Apr. 17—Brief filed by General Counsel.

" 26—Reply brief filed by taxpayer. 4/26/37 copy served.

1938

Jan. 5—Motion for leave to file answer to amended petition, answer lodged, filed by General Counsel.

5 1/7/38 granted.

" 28—Findings of fact and opinion rendered, Mr. Arnold, Div. 12. Judgment will be entered under Rule 50.

Mar. 2—Computation of deficiency filed by General Counsel.

" 3—Hearing set March 23, 1938 on settlement.

" 5—Consent to settlement filed by taxpayer.

" 9—Order and decision entered, Wm. W. Arnold, Div. 12.

May 21—Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by General Counsel.

6

Jun. 6—Proof of service filed by General Counsel. Attorney and taxpayer.

" 7—Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by taxpayer.

" 8—Proof of service filed by taxpayer.

" 15—Praecipe filed by General Counsel with proof of service thereon.

Jul. 18—Praecipe of record filed by taxpayer with proof of service thereon.

Amended Petition.

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UNITED STATES BOARD OF TAX APPEALS.

Docket No. 78919.

HARRY H. NEUBERGER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

8

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his deficiency letter (IT:AR:A-2:AEF-90D), dated March 4, 1935, and as the basis of this proceeding, petitioner sets forth the following:

1. The petitioner is an individual, whose address is, c/o Proskauer, Rose & Paskus, 11 Broadway, New York.

2. The notice of deficiency, a copy of which is attached hereto, was mailed to petitioner on March 4, 1935.

3. The taxes in controversy are income taxes for the calendar year 1932 in the amount of $9,021.24. 9

4. Determination of the tax set forth in the notice of deficiency is based upon the following error:

(a) The Commissioner has erroneously disallowed as a deduction a loss of $27,096.88 on sales of securities held less than two years.

(b) In the alternative: The Commisisoner has erroneously disallowed as a deduction taxes and

10 commissions paid by petitioner in connection with the purchase and sale of securities during 1932 in the respective amounts of $2,779.69 and $5,220.56.

(c) In the alternative: The Commissioner has erroneously disallowed as a deduction a loss of $327 on a commodity transaction.

5. The facts upon which the petitioner relies as the basis of this petition, are as follows:

(a) During the year 1932, petitioner sold securities held less than two years at a net loss of $26,769.88, which he deducted on his return. Petitioner's transactions in such securities during 1932 were in such volume and amount as to constitute the carrying on of a business.

11

(b) During the year 1932, the taxpayer was a member of a partnership, which partnership during said year sold securities held less than two years at a profit, of which petitioner's distributive share was in excess of $26,769.88.

(c) Petitioner's share of the net income of said partnership, reported on petitioner's return for the year 1932, was in excess of the sum of $26,769.88.

12 (d) In connection with the purchase and sale of securities during the year 1932, petitioner paid taxes and commissions in the respective sums of $2,779.69 and $5,220.56. These taxes and commissions were not deducted on the return, but the taxes and commissions paid on securities sold during 1932 were deducted from the selling price reported on the return. The commissions in question were all paid to the firm of Hilson & Neuberger and were reported in its income tax return for the year 1932.

(e) In 1932, petitioner sold a grain futures contract held less than two years at a loss of $327. This sum has not been allowed as a deduction. 13

6. In the event that the Board holds that the Commissioner correctly interpreted Section 23 (r) of the Revenue Act of 1932 in this case, then claim is hereby made that said Section is unconstitutional, in that it deprives taxpayer of property without due process of law, and it is arbitrary, capricious and discriminatory, in violation of the Fifth Amendment to the Federal Constitution.

WHEREFORE, petitioner prays that this Board may hear the proceeding and grant him relief from the deficiency asserted by the Commissioner, together with such other relief as to this Board may seem just and proper, upon the grounds above set forth. 14

Respectfully submitted,

WALTER MENDELSOHN,
WILBUR H. FRIEDMAN,
Counsel for Petitioner,
11 Broadway,
New York, N. Y.

Dated, New York, February 11, 1937. 15

Amended Petition.

State of New York,
County of New York—ss.:

HARRY H. NEUBERGER, being duly sworn, deposes and says: He is the petitioner above-named; that he has read the foregoing amended petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated upon information and belief, and those facts he believes to be true.

HARRY H. NEUBERGER.

Sworn to before me this
11th day of February, 1937.

MARCIA C. MORSE,
Notary Public.
New York Co. Clerk's No. 258, Reg. No. 8-M-440.
My Commission expires March 30, 1938.
(Seal)

NOTICE OF DEFICIENCY, ANNEXED TO AMENDED PETITION.

19

IT:AR:A-2
AEF-90D

Mar. 4 1935

Mr. Harry H. Neuberger,
c/o Mr. Harry Goodkin,
116 John Street,
New York, New York.

Sir:

You are advised that the determination of your income tax liability for the year 1932, discloses a deficiency of $9,021.24 as shown in the statement attached.

In accordance with Section 272 (a) of the Revenue Act 20
of 1932, as amended by Section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the 21
accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By (Signed) CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:

Statement
Form 870

Notice of Deficiency, Annexed to Amended Petition.

22 STATEMENT.

IT:AR:A-2
AEF-90D

In re: Mr. Harry H. Neuberger,
c/o Mr. Harry Goodkin,
116 John Street,
New York, New York.

Year 1932

23 Year	Income Tax Liability	Income Tax Assessed	Deficiency
1932	$9,566.80	$545.56	$9,021.24

Reference is made to the letter dated October 23, 1934, from your representative, Mr. Wilbur H. Friedman, 11 Broadway, New York, New York, in reply to office letter addressed to you under date of October 13, 1934, advising you that the report of the internal revenue agent in charge, 17 Battery Place, New York, New York, dated May 1, 1934, covering an investigation of your 1932 income tax liability had been approved in this office. This report indicated a deficiency in tax amounting to $9,021.24.

In accordance with the request contained in Mr. Friedman's letter, a conference was held in this office on December 5, 1934, at which time the question of disallowing the loss of $27,096.88, claimed on sales of stocks held less than two years was considered. The loss was disallowed by the Revenue agent in accordance with section 23(r) of the Revenue Act of 1932.

24

It is your contention that inasmuch as you reported on your return profit from sales of securities by the partnership of Hilson and Neuberger, the loss of $27,096.88 should be applied against such partnership income.

You are advised that this office holds that a taxpayer may not offset his personal losses from the sale of stocks

and bonds held less than two years by his share of similar gains of a partnership of which he is a member. Therefore, the action of the agent in disallowing the loss of $27,096.88 has been approved in this office. 25

Your net income and tax liability have therefore been adjusted as follows:

Ordinary net income as shown on return		$40,622.38
Add:		
1. Increase in partnership income		488.38
2. Loss disallowed		27,096.88
Ordinary net income as adjusted		$68,207.64
Capital net loss as shown on return		($28,152.69)
Ordinary net income as adjusted		$68,207.64
Less:		
Dividends	$22,593.93	
Personal exemption	3,300.00	25,893.93
Amount subject to normal tax		$42,313.71
Normal tax of 4% on $4,000.00		160.00
Normal tax of 8% on $38,313.71		3,065.10
Surtax on $68,207.64		9,886.44
Total		$13,111.54
Less: 12½% of capital net loss of $28,152.69	3,519.08	
Tax paid at source	25.66	3,544.74
Correct tax liability		$9,566.80
Tax previously assessed		545.56
Deficiency in tax		$9,021.24

26

27

28

Explanation of Changes

1. In accordance with information furnished by the revenue agent in his report dated May 1, 1934, covering an investigation of the partnership of Hilson and Neuberger, your share of the distributive income from this partnership has been increased by $488.38.

2. The loss of $27,096.88 claimed on sales of stocks held less than two years has been disallowed in accordance with section 23(r) of the Revenue Act of 1932, as explained above.

The adjustment of these items indicates a deficiency in tax amounting to $9,021.24 as explained above.

29

A copy of this communication has been forwarded to your representative, Mr. Wilbur H. Friedman, 11 Broadway, New York, New York, who has on file in this office a duly recorded power of attorney.

Answer to Amended Petition.

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 78919.

30

HARRY H. NEUBERGER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue and

for answer to the amended petition filed at the hearing of 31
the above-stated case, admits, denies and alleges as follows:

1. Admits the allegations in paragraph 1 of the amended petition.

2. Admits the allegations in paragraph 2 of the amended petition.

3. Admits the allegations in paragraph 3 of the amended petition.

4. Denies that error was committed in any respect as set forth in subparagraphs (a), (b) and (c) of the amended petition.

32

5 (a), (b), (c), (d) and (e). Admits only such facts alleged in the corresponding subparagraphs of paragraph 5 of the amended petition as are covered in the stipulation of facts and agreed to by the attorneys of the respective parties and filed at the hearing of the above proceeding. Denies all allegations of facts not covered in said stipulation of facts.

6. Denies the material allegations in paragraph 6 of the amended petition.

7. Denies generally and specifically each and every material allegation in the amended petition not herein admitted, qualified, or denied.

33

WHEREFORE, it is prayed that the Commissioner's determination be approved and that the taxpayer's appeal be denied.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

J. R. JOHNSTON,
Special Attorney,
Bureau of Internal Revenue.

Stipulation of Facts.

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UNITED STATES BOARD OF TAX APPEALS.

Docket #78919.

HARRY H. NEUBERGER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

35

IT IS HEREBY STIPULATED between counsel for petitioner and counsel for respondent that the facts in the above case are as follows:

1. Petitioner is an individual and filed his income tax return for the calendar year 1932 in the Second District, New York. Said return is annexed hereto, marked Exhibit A, and is made a part hereof.

2. During said calendar year, petitioner traded in stocks and other securities in his individual capacity and incurred a net loss from sales or exchanges of stocks
36 and bonds which were not capital assets (as defined in Section 101 of the Revenue Act of 1932), in the sum of $25,588.93.

3. In computing said loss, stock transfer taxes and commissions on sales of securities were deducted from the selling price; commissions paid on purchase of securities were added to cost and treated as part of cost of securities sold. The Federal and New York stock transfer taxes on the sales amounted to $2,779.69.

Total commissions paid in 1932 in respect of shares bought and shares sold that year amounted to the sum of $4,440.61 of which $2,133.63 was commissions paid on the purchase of shares sold in 1932, and $2,306.98 was commissions paid on the sale of shares in 1932. Neither said taxes nor commissions were separately deducted on the return, although they were paid during the year 1932. The said commissions were paid to the firm of Hilson & Neuberger (referred to in paragraph "4" hereof), and were included by it as income in its income tax return, for the year 1932. 37

4. During the calendar year 1932, petitioner was a member of the partnership of Hilson & Neuberger, a Stock Exchange brokerage firm, 100 Broadway, New York, which also in said year traded in stocks and other securities. For the year 1932 said partnership derived a profit from the sale of stocks and other securities which were not capital assets as defined in Section 101 of the Revenue Act of 1932, in the amount of $142,802.29. The partnership had other income during 1932 (including commissions received), of $170,830.65, and deductions of $203,981.78, or a net income of $109,651.06. Petitioner's distributive share of said partnership profits amounted to $36,000 of the first $94,000 and 45% of the balance thereof. 38 39

5. During the calendar year 1932, petitioner incurred a loss of $327 upon the sale of a grain futures contract held less than two years. This loss was disallowed by the Commissioner in the determination of the deficiency here involved, but is now conceded as not being within the limitations set forth under Section 23(r) of the Revenue Act of 1932, and this loss may now be allowed on the Rule 50 computation.

40 6. Petitioner's distributive share of the partnership profits for 1932 was increased by the Commissioner by $488.38, which item is not in dispute.

7. During the year 1932, petitioner was a member of the New York Stock Exchange, and spent practically every working day of the year 1932 on the floor of the Exchange, trading for the account of his firm (Hilson & Neuberger), executing orders on behalf of customers of said firm, and trading for his individual account. While it is difficult for him to apportion his time to each of these activities, he gave considerable thought to the transactions for his individual account during
41 the year 1932. Reference is made to his 1932 return for a list of said transactions. He was constantly on the lookout for securities to buy or sell both for his individual account and for the account of his firm. He gave some thought to his individual transactions on practically every trading day, and the aggregate of time devoted to same during the year 1932 was very large.

8. The petitioner now claims the right to deduct from taxable income for the year 1932, the aforesaid loss of $25,588.93 from individual trading in stocks and other
42 securities, which deduction has been disallowed by the Commissioner; and in the alternative, the petitioner now claims the right to deduct the taxes and commissions referred to in paragraph "3" hereof.

WILBUR H. FRIEDMAN,
Counsel for Petitioner.

MORRISON SHAFROTH,
Counsel for Respondent.
J. R. J.

Dated, February 15, 1937.

Exhibit A, Annexed to Stipulation of Facts.

15

Form 1040
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN $5,000 AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1932

(Collector's Stamp) 27 ACKNOWLEDGMENT

Do Not Write in These Spaces

File No. 2115

Serial No. DEFERRED 7984

(Collector's Stamp) 6 MAR 13 COLLECTOR 2ND DIST. N.Y.

2-New York

Cash Check M.O. Cert. of Ind.

First Payment 545.56

Tax $ 902.1=4

Penalty

Interest

Total $

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1933

PRINT NAME AND ADDRESS PLAINLY BELOW

HARRY H. KEUERGER (Name)

Bank CR or RAR 5-1-34

Audited by AET 3-4-1935

Unit No. AP-A-2

450 Beaver Street (Street and number, or rural route) C/o H.Hentz & Co.

New York City (Post office) (County) New York (State)

Occupation, Business, or Profession Member of New York Stock Exchange

1. Are you a citizen [illegible] United States? Yes
2. If you filed a return for 1931, to which Collector's office was it sent? Second Dist.N.Y.
3. Is this a joint return of husband and wife? Yes
4. State name of husband or wife if a separate return was made and the Collector's office to which it was sent
5. Were you married and living with husband or wife on the last day of your taxable year? Yes
6. If not, were you on the last day of your taxable year supporting in your household one or more persons [illegible]
7. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support [illegible] support from you during your taxable year?
8. If your status in respect to question 5, 6, or 7 changed during the year, state date and [illegible]
9. State whether your books are kept on cash or accrual basis

U. S. BOARD OF TAX APPEALS
FILED
FEB 15 1937
EXHIBIT A-1

ATTACH REMITTANCE HERE

	INCOME	Amount received	Deductions paid (Explain in Schedule F)	
1.	Salaries, Wages, Commissions, Fees, etc. (State name and address of employer)	$	$	$
2.	Income from Business or Profession. (From Schedule A)			$ 907 44
3.	Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)			1 983 33
4.	Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source			
5.	Income from Partnerships, Syndicates, Pools, etc. (State name and address) Hilson & Hemberger 100 Broadway Div.(10)1667. Profits			44 350 55
6.	Income from Fiduciaries. (State name and address)			
7.	Rents and Royalties. (From Schedule B)			27 098 88 X
8.	Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)			
9.	Taxable Interest on Liberty Bonds, etc. (From Schedule E) Div.(10) 1667 DIVIDEND NO. 5			22 593 93
10.	Dividends on: (a) Stock of Domestic Corporations subject to taxation under Title I of 1932 Act			
	(b) Stock of Domestic Corporations not subject to taxation under Title I of 1932 Act			108 38
	(c) Stock of Foreign Corporations			
11.	Other Income. (State nature of income) (a)			
	(b)			
12.	TOTAL INCOME IN ITEMS 1 TO 11			$ 50 287 37
	DEDUCTIONS			
13.	Interest Paid		$	
14.	Taxes Paid. (Explain in Schedule F)			600 38
15.	Losses by Fire, Storms, etc. (Explain in Table at foot of page 2)			
16.	Bad Debts. (Explain in Schedule F)			
17.	Contributions. (Explain in Schedule F)		3	469 34
18.	Other Deductions Not Reported Above. (Explain in Schedule F) Assuming Custodian etc		5	595 37
19.	TOTAL DEDUCTIONS IN ITEMS 13 TO 18			$ 9 664 99
20.	NET INCOME (Item 12 minus Item 19)			$ 40 622 38
21.	Less: Net loss for 1931 (Submit Schedule)			$
22.	NET INCOME FOR TAX COMPUTATION (Item 20 minus Item 21)			$ 40 622 38

RECEIVED MAR 15 1933 INTERNAL REVENUE

COMPUTATION OF TAX (See Instructions 22)

23.	Net Income Subject to Tax (Item 22 above)	$	$ 40 622 38	
24.	Less: Interest on Liberty Bonds, etc. (Item 9)	$		
25.	Dividends (Item 10 (a))	22,593 93		
26.	Personal Exemption	2,500 00		
27.	Credit for Dependents	800 00		
28.	Total of Items 24 to 27	$25,893 93	25 893 93	
29.	Balance subject to Normal Tax (Item 23 minus 28)		$ 14 728 45	
30.	Amount taxable at 4% (Not over $4,000)		$ 4 000 00	
31.	Amount taxable at 8% (Item 29 minus 30)		$ 10 728 45	
32.	Amount of Capital Net Gain or Loss (From Schedule D)		$ 28 152 69	
33.	Normal Tax (4% of Item 30)			$ 160 00
34.	Normal Tax (8% of Item 31)			858 28
35.	Surtax on Item 22 (See Instruction 23)			3 072 82
36.	Tax on Net Income (total of Items 33 to 35)			$ 4 090 30
37.	Ajustment for Capital Gain or Loss (12½% of Item 32)			3 518 08
38.	Total Tax (total of or difference between Items 36 and 37)			$ 572 22
39.	Less: Income Tax Paid at Source (3% of Item 6)	$ 25 56		
40.	Income Tax Paid to a foreign country or U. S. possession			26 66
41.	Balance of Tax (Item 38 minus 39 and 40)			$ 545 56

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me and is, to the best of my knowledge and

SCHEDULE A—INCOME FROM BUSINESS OR PROFESSION (See Instruction 2)

1. Total receipts from business or profession (state kind of business) ..... $

Cost of Goods Sold

2. Labor ..... $
3. Material and supplies .....
4. Merchandise bought for sale .....
5. Other costs (itemize below or on separate sheet) .....
6. Plus inventory at beginning of year .....
7. Total (Lines 2 to 6) ..... $
8. Less inventory at end of year .....
9. Net Cost of Goods Sold (Line 7 minus Line 8) ..... $

Enter "C," or "C or M," on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Other Business Deductions

10. Salaries not included as "Labor" in Line 2. (Do not deduct compensation for your services) ..... $
11. Interest on business indebtedness to others .....
12. Taxes on business and business property .....
13. Losses (explain in table at foot of page) .....
14. Bad debts arising from sales or services .....
15. Depreciation, obsolescence, and depletion (explain in table provided at foot of page) .....
16. Rent, repairs, and other expenses (itemize below or on separate sheet) .....
17. Total (Lines 10 to 16) ..... $
18. Total Deductions (Line 9 plus Line 17) ..... $
19. Net Profit (Line 1 minus Line 18) (Enter as Item 2) ..... $

Explanation of deductions claimed on Lines 8 and 16 .....

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instructions 7)

1. Kind of Property	2. Amount Received	3. Cost or Value (if acquired before March 1, 1913, whichever is greater)	4. Depreciation (Explain in table at foot of page)	5. Repairs	6. Other Expenses (Itemize below)	7. Net Profit (Enter as Item 7)
	$	$	$	$	$	$

Explanation of deductions claimed in Column 6 .....

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 8)

1. Kind of Property	2. Date Acquired	3. Amount Realized	4. Cost	5. March 1, 1913, Value (if Acquired Prior to That Date)	6. Cost or Imputed Cost Subsequent to Acquisition or March 1, 1913	7. Depreciation Allowable (or Allowed) Since March 1, 1913	8. Net Profit or Loss (Enter as Item 8)
		$	$	$	$	$	$

Kind of property and location .....

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OR EXCHANGE OF CAPITAL ASSETS

5%	[illegible]	1930	70'085'20	0'643'12		
250k	[illegible]	7356\31	0'516'00	3'533'52		
750	[illegible]	-	0'110'00	23'200'82		
ch	[illegible]	1850	3'030'00	0'829'52	030'52	
430	[illegible]	7650\33	0'313'72	0'730'06		
305	[illegible]	1850\38	30'855'03	30'302'90	1'10[illegible]	

Kind of property and location .....

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OF SECURITIES (See Instruction 9)

	Personal Amount Free From Taxation	4. Amount Owned at Close of Taxable Year	5. Interest Received or Accrued During Taxable Year
[illegible] 0'000'00			
[illegible] 12'00		xxxxxx	xx
[illegible] 2'10		xxxxxx	xx
[illegible] 32'30		xxxxxx	xx
[illegible] 107'13			
(c) Liberty 3½ and 4¼% Bonds and Treasury Bonds		$5,000	
(d) Treasury Notes		All	xxxxxx xx

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 5, 14, 16, 17, AND 18

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Life Years Assumed	4. Proportion Land Assumed	5. Cost (Exclusive of Land)	6. March 1, 1913, Value (if Acquired Prior to That Date) Exclusive of Land	7. Depreciation Allowable (or Allowed) Since March 1, 1913	8. Depreciation Allowable This Year
				$	$	$	$

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 15

1. Kind of Property	2. Date Acquired	3. Cost or Value (if acquired before March 1, 1913, whichever is greater)	4. Depreciation Sustained	5. Depreciation Allowable Since Acquisition	6. Insurance and Salvage Value	7. Deductible Loss
		$	$	$	$	$

43

EXHIBIT A, ANNEXED TO STIPULATION OF FACTS. 44

Petitioner's Income Tax Return for Calendar Year 1932.

(PHOTOPRINTS.)

45

13	Interest Paid								
14	Taxes Paid. (Explain in Schedule F)				600	28			
15	Losses by Fire, Storm, etc. (Explain in Table at foot of page 2)								
16	Bad Debts. (Explain in Schedule F)								
17	Contributions. (Explain in Schedule F)		3	469	34				
18	Other Deductions Not Reported Above. (Explain in Schedule F) Insurance, Custodian etc		5	595	37				
19	TOTAL DEDUCTIONS IN ITEMS 13 TO 18					$	9	664	93
20	NET INCOME (Item 12 minus Item 19)					$	40	622	38
21	Less: Net loss for 1931 (Submit Schedule)					$			
22	NET INCOME FOR TAX COMPUTATION (Item 20 minus Item 21)					$	40	622	38

COMPUTATION OF TAX (See Instruction 23)

23	Net Income Subject to Tax (Item 22 above)		$	40	622	38			
24	Less: Interest on Liberty Bonds, etc. (Item 9)	$							
25	Dividends (Item 19 (a))	22,593	93						
26	Personal Exemption	2,500	00						
27	Credit for Dependents	800	00						
28	Total of Items 24 to 27	$25,893	93	25	893	93			
29	Balance subject to Normal Tax (Item 23 minus 28)		$	14	728	45			
30	Amount taxable at 4% (not over $4,000)		$	4	000	00			
31	Amount taxable at 8% (Item 29 minus 30)		$	10	728	45			
32	Amount of Capital Net Gain or Loss (From Schedule D)		$	2916	69				
33	Normal Tax (4% of Item 30)						$	160	00
34	Normal Tax (8% of Item 31)							858	28
35	Surtax on Item 22 (See Instruction 23)							3,072	92
36	Tax on Net Income (total of Items 33 to 35)						$	4,090	30
37	Adjustment for Capital Gain or Loss (12½% of Item 32)							583	32
38	Total Tax (total of or difference between Items 33 and 37)						$	572	22
39	Less: Income Tax Paid at Source (3% of Item 4)		$	25	66				
40	Income Tax Paid to a foreign country or U. S. possession							25	66
41	Balance of Tax (Item 38 minus 39 and 40)						$	543	56

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my knowledge and belief is a true and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1932 and the Regulations issued thereunder.

(See Instruction 27)

Sworn to and subscribed before me this 13th day of March, 1933.

NOTARIAL SEAL

Margaret Paldini
(Signature of officer administering oath)

(Title)

If return is made by agent, the power thereto must be annexed to this form.

Larry L Hen Lung
(Signature of individual or agent)

(Address of agent)

An amended return must be marked "Amended" at top of return. Checks and drafts will be accepted only if payable at par.

SCHEDULE B—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OF [illegible] CURITIES (See Instruction 9)

(a) Liberty 4% and 4½% Bonds and Treasury Bonds							35,000				
(c) Treasury Notes							AE				

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

(If buildings, state material of which constructed)	1. Kind of Property	2. Date Acquired	3. Cost or Other Basis	4. Depreciation Allowed (or Allowable) Prior to March 1, 1913	5. Depreciation Allowed (or Allowable) March 1, 1913, to Close of Preceding Year	6. Depreciation Allowable This Year
			$	$	$	$

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORMS, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 15

1. Kind of Property	2. Date Acquired	3. Cost or Value as of March 1, 1913, if Acquired Before That Date	4. Depreciation Subsequent	5. Depreciation Allowable Prior to Loss	6. Insurance and Salvage Value	7. Deductible Loss
		$	$	$	$	$

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47 EXHIBIT A, ANNEXED TO STIPULATION OF FACTS

(Continued).

(PHOTOPRINTS.)

[For the Convenience of Court and Counsel this Exhibit (Photostatic Copies) is bound in on the Opposite Page.]

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Exhibit A, Annexed to Stipulation of Facts (Cont'd).

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State how property was acquired .....

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 9)

	3. Principal Amount Exempt From Taxation	4. Amount Owned in Excess of Exemption	5. Interest on Amount in Excess of Exemption (Enter as Item 9)
HARRY H. NEUBERGER NEW YORK CITY 1932.		xxxxxx	.....

ITEM #14 TAXES.

Realty	276.33
Club Dues-Assessments	101.00
New York Personal	25.90
Auto License	32.50
Gasoline & Amusement	79.00
Check & Stock Transfer	85.55
	600.28

ITEM #17 CHARITABLE CONTRIBUTIONS.

Federation for Support of Jewish Phil. Societies	2,021.00
Montefiore Hospital	625.00
Emergency Unemployment Relief	315.00
Emergency Shelter Fund	25.00
Hundred Neediest Cases	100.00
Northwoods Sanitarium	50.00
Aged Couples Fund-New York Evening Post	25.00
Boys' Athletic Club	10.00
Home for Hebrew Infants	47.34
United Hospital Fund	25.00
American Red Cross	25.00
Phillips Exeter Xmas Fund	25.00
Blue Bird Camp	25.00
Grand Street Settlement	15.00
Henry Street Settlement	18.00
Council of Jewish Women	15.00
Needlework Guild of America	15.00
United Catholic Charities	50.00
New York Guild for Jewish Blind	10.00
Monmouth Memorial Hospital	10.00
National Jewish Hospital	10.00
Selig Solomon Society	5.00
Henry Meinhard Memorial	3.00
	$3,469.34

[redacted]

18

State how property was acquired .....

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 8a)

SCHEDULE "D" HARRY H. NEUBERGER. NEW YORK CITY.

		ACQUIRED.	COST	SALE	PROFIT	LOSS.
282	Detroit Edison	1920/29	29,222.03	30,985.40	1,763.37	
436	Standard Oil, California	1920/23	9,379.15	8,139.98		1,239.17
5M	Midvale Steel Cvd. 5%	1920	3,620.00	4,456.25	836.25	
5M	Utah Power & Light 5%	"	3,770.00	3,546.25		223.75
8M	Rhein Elbe Union 7%	1926/27	8,276.80	3,239.25		5,037.55
25M	City of Tokio 5%	1920	16,062.50	8,843.75		7,218.75
150	Consolidated Gas, Pfd.	1928	5,962.77	12,610.00	6,647.23	
770	DO COM.	1921/29	23,494.53	25,761.10	2,266.57	
2500	Sperry Vacuum	1923	11,723.45	27,025.00	15,301.55	
205	Singer Mfg. Co.		66,459.33	25,210.89		41,248.44
	(200	1920/29				
	5-sold Feb-8-32)	Jan-19-30				
			$177,970.56	149,817.87	26,814.97	54,967.66
				NET CAPITAL LOSS	28,152.69	

[redacted]

SCHEDULE "C" HARRY H. HEUBERGER--NEW YORK CITY.

		Acquired	Cost	Sale	Profit	Loss
100	Lehman Corpn.	1931	3,676.00	3,707.50	31.50	
100	Eitengen Schild Dec.	1930	1,051.00	1,245.00	194.00	
	Jan.	1932				
100	Eastman Kodak	1932	7,686.00	8,070.00	384.00	
300	Gillette Safety Razor	"	15,303.00	15,635.00	332.00	
2500	Socony Vacuum	"	25,025.00	26,200.00	1,175.00	
200	Gillette Safety Razor	"	10,027.00	10,115.00	88.00	
100	Norfolk & Western	"	12,701.00	12,832.50	131.50	
100	Gillette Safety Razor	"	5,587.50	5,612.50	25.00	
500	Cons. Gas N.Y.	"	29,467.50	29,612.50	145.00	
600	Aircraft	"	9,066.00	9,317.50	251.50	
700	Cons. Gas N.Y.	"	41,557.00	42,390.00	833.00	
600	Lehman Corpn.	"	24,943.50	25,320.00	376.50	
300	Radio "B"	"	5,128.00	5,222.50	94.50	
1000	Kroger Groc.&Bkg.	"	26,447.50	12,837.50		13,610.00
100	Norfolk & Western	"	12,601.00	12,495.00		106.00
100	Beatrice Creamery	"	4,101.00	4,097.00		4.00
600	Gillette Safety Razor	"	32,656.00	31,320.00		1,336.00
100	N.Y.N.H.Hartford Ry.	"	3,001.00	2,895.00		106.00
200	Curtiss Wright	"	602.00	590.00		12.00
200	Dupont denemours	"	10,077.00	9,996.40		80.60
200	Aircraft	"	3,027.00	2,902.50		124.50
100	Cons. Gas N.Y.	"	5,551.00	5,520.00		31.00
500	Socony Vacuum	"	5,255.00	4,677.50		577.50
1600	Lorillard Inc.	"	23,716.00	22,145.00		1,571.00
200	N.Y.Central R.R.	"	5,752.00	5,102.50		649.50
200	Fourth Natl. Investors	"	3,702.00	3,697.92		4.08
2400	Socony Vacuum	"	23,411.50	23,114.50		297.00
200	Radio "B"	"	3,189.50	2,936.00		253.50
400	Cons. Gas N.Y.	"	27,066.50	23,167.50		3,899.00
400	American Rolling Mills	"	4,884.00	4,477.50		406.50
150	Commonwealth Edison	"	13,573.75	13,486.00		87.75
5000	Midwest Utilities Conv.5	"	1,631.25	1,546.26		84.99
200	Consol. Gas N.Y.	"	12,352.00	12,336.00		16.00
50	Amer. Car & Fdy.	"	1,983.25	1,398.00		585.25
300	Continental Oil	"	1,878.00	1,854.00		24.00
1300	Lorillard Inc.	"	18,925.50	20,546.50	1,621.00	
200	Lehman Corpn.	"	9,002.00	9,073.50	71.50	
1100	Consol. Gas N.Y.	"	68,848.50	69,898.00	1,049.50	
500	Socony Vacuum	"	4,380.00	4,987.50	607.50	
5000	Midwest Util.Conv.5	"	1,381.25	1,413.75	32.50	
1500	Socony Vacuum	"	15,015.00	15,400.00	385.00	
400	Consol. Gas N.Y.	"	23,891.50	24,372.00	480.50	
100	Lambert Co.	"	4,276.00	4,343.00	67.00	
100	Amer. Power & Lt.	"	951.00	1,118.00	167.00	
300	Internatl. Harvester	"	5,840.50	6,116.50	276.00	
300	Consol. Gas N.Y.	"	16,828.00	18,041.50	1,213.50	
800	New York Central	"	10,780.00	11,040.00	260.00	
400	Consol. Gas N.Y.	"	21,041.50	20,884.50		157.00
100	Tidewater Oil Pf.	"	3,782.25	3,493.00		289.25
400	New York Central	"	8,616.50	8,497.00		119.50
300	Lehman Corpn.	"	11,040.50	10,879.00		161.50
300	American Tobacco	"	20,803.00	20,642.50		160.50
1000	Lorillard Inc.	"	14,885.00	13,805.00		1,080.00
200	Montgomery Ward	"	1,552.00	1,386.00		166.00
100	Lehman Corpn.	"	4,151.00	4,043.00		108.00
100	Bankers Invest.N.Y.	"	5,367.50	5,044.40		323.10

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53 EXHIBIT A, ANNEXED TO STIPULATION OF FACTS

(Continued).

(PHOTOPRINTS.)

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Exhibit A, Annexed to Stipulation of Facts
(Cont'd).

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SCHEDULE "C"--HARRY H. [redacted]-- New York City

		Cost	Sale	Profit	Loss
700	Consolidated Gas N.Y. 1932	32,969.50	32,376.00		593.50
500	Lorillard, Inc. "	7,505.00	6,790.00		715.00
100	American Teb. Co. "	6,876.00	6,872.50		3.50
300	American Tel. & Tel. "	30,053.00	28,991.50		1,061.50
200	Union Carbide "	3,802.00	3,586.00		216.00
200	Bank of Manhattan "	4,125.00	3,922.60		202.40
100	Natl. City Bank "	3,402.50	3,170.58		231.92
700	Consol. Gas N.Y. "	36,644.50	37,563.50	919.00	
1500	Socony Vacuum "	13,390.00	14,400.00	1,010.00	
500	Amer. Tobacco B. "	34,192.50	34,725.00	532.50	
300	Socony Vacuum "	2,515.50	2,617.50	102.00	
300	Gillette Safety Pf. "	16,360.75	18,179.00	1,818.25	
700	Amer. Tobacco B. "	45,469.50	46,207.50	738.00	
600	Consol. Gas N.Y. "	30,143.50	31,333.00	1,189.50	
700	Socony Vacuum "	5,932.00	6,107.50	175.50	
500	Fourth Natl. Invest. "	7,867.50	7,994.70	127.20	
100	" " "	1,501.00	1,561.44	60.44	
500	Lehman Corpn. "	15,917.50	16,027.50	110.00	
100	Amer. Tobacco Com. "	6,176.00	6,347.50	171.50	
1000	" " "B" "	58,397.50	59,887.50	1,490.00	
100	Fourth Natl. Invest. "	1,438.50	1,486.44	47.94	
800	Consol. Gas. N.Y. "	36,895.50	37,494.00	598.50	
400	Lorillard, Inc. "	3,979.00	4,122.00	143.00	
400	" " "	3,966.50	4,084.50	118.00	
500	Consol. Gas N.Y. "	16,505.00	23,265.00	6,760.00	
200	American Tobacco B. "	9,902.00	10,345.00	443.00	
500	Socony Vacuum "	3,030.00	4,362.50	1,332.50	
200	American Tobacco B. "	10,152.00	10,470.00	318.00	
200	Consol. Gas N.Y. "	7,639.50	7,686.00	46.50	
100	Tidewater Oil Pf. "	3,213.50	3,293.00	79.50	
200	American Tel & Tel "	16,902.00	16,936.00	34.00	
200	Chicago Northwestern Pf. "	1,252.00	1,582.00	330.00	
400	Lehman Corpn. "	14,004.00	14,185.00	181.00	
200	National Bond & Share "	3,919.17	4,772.00	852.83	
500	Stand Oil-Indiana "	10,025.00	10,713.75	688.75	
800	F. Shattuck, Inc. "	3,993.75	4,705.00	711.25	
800	Kroger Groc. & Bkg. "	7,255.00	7,955.00	700.00	
1000	Tidewater Oil "	4,247.50	4,910.00	662.50	
10000	Chicago N.Western Cv.4½ "	1,037.50	1,483.50	446.00	
1000	Lorillard, Inc. 1931	19,691.25	11,830.00		7,861.25
400	Consol. Gas N.Y. 193	14,704.00	14,334.50		369.50
100	Fourth Natl. Invest. "	1,276.00	1,061.44		214.56
400	American Tel & Tel "	35,166.50	34,634.50		532.00
500	Lorillard, Inc. "	5,567.50	5,477.50		90.00
400	American Tobacco B. "	20,529.00	19,965.00		564.00
200	Amer. Tel & Tel "	16,902.00	16,586.00		316.00
100	Lehman Corpn. "	3,426.00	3,340.00		86.00
300	J. C. Penney "	5,298.75	5,073.00		225.75
100	Gillette Razor Pfd. "	6,501.00	6,290.00		211.00
3000	Socony Vacuum "	30,030.00	19,925.00		10,105.00
500	Union Carbide "	12,817.50	12,325.00		492.50
500	Montgomery Ward "	5,692.50	5,492.50		200.00
10000	Third Ave. Ry. Adj.5s "	3,012.50	2,006.25		1,006.25
11000	Tobacco Products 6s "	9,544.03	8,847.82		696.21
225	New York Steam "	11,413.13	6,800.25		4,612.88
300	Dupont "	12,265.50	11,766.60		498.90
300	N.Y. Chicago & St. Louis "	4,253.00	4,147.00		106.00
700	Sears-Roebuck "	17,132.00	15,392.50		1,739.50
100	Pere Marquette Pr.Pf. "	2,101.00	1,488.00		613.00
1600	Gillette Razor "	31,091.00	29,406.00	22937 16	1,685.00
50	Pere Marquette "	567.17	495.50		71.67

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1-38303 [redacted]

PAGE #3 SCHEDULE "C" HARRY H. NEUBERGER NEW YORK CITY

		ACQUIRED.	COST.	SALE.	PROFIT	LOSS.
1000	Internatl Tel & Tel	1932	13,760.00	10,747.50		3,012.50
500	Kennecott Copper	"	9,317.50	5,955.00		3,362.50
1000	Montgomery-Ward	"	13,260.00	12,385.00		875.00
1500	Dupont.	"	63,877.50	62,795.50		1,082.00
50	December Wheat	"	29,264.50	28,937.50		327.00
1000	Commonwealth & Southern	"	3,010.00	3,760.00	750.00	
4500	Montgomery-Ward	"	50,371.00	53,657.50	3,286.50	
1000	J.C.Penney	"	20,135.00	21,650.00	1,515.00	
2000	Sears-Roebuck	"	44,895.00	47,637.50	2,742.50	
1000	Western-Union Tel	"	35,048.00	36,225.00	1,177.00	
200	B.F.Goodrich Pfd	"	3,527.00	3,757.00	230.00	
1000	Socony Vacuum	"	11,635.00	11,720.00	85.00	
500	Tidewater Oil	"	2,067.50	2,367.50	300.00	
150	Pere Marquette Pfd	"	1,951.50	3,173.50	1,222.00	
700	Lehman Ins.	"	33,307.00	34,692.50	1,385.50	
2000	Johns Manville	"	50,395.00	51,300.00	905.00	
200	Western Union Tel	"	7,689.50	8,167.50	478.00	
1600	Sears Roebuck	"	35,303.50	36,152.50	849.00	
2200	Internatl.Tel & Tel	"	26,122.00	26,302.00	180.00	
650	Pere Marquette	"	6,539.83	8,360.25	1,820.42	
10	Midwest Utilities Conv.5%	"	462.50	783.90	321.40	
50	Pere Marquette Pfd	"	650.50	747.55	97.05	
50	J.I.Case Pfd	"	3,452.00	3,491.50	39.50	
1500	Aircraft	"	37,428.00	38,337.50	909.50	
1100	Johns Manville	"	32.923.50	33.140.00	216.50	
700	Aircraft	"	15,394.50	15,830.00	435.50	
100	Celanese	"	3,392.50	4,940.99	1,548.49	
900	Aircraft	"	24,009.00	24,710.00	701.00	
100	DO	"	2,438.50	2,440.00	1,50	
500	Socony-Vacuum	"	5,067.50	5,410.00	342.50	
50	Pere Marquette Pfd	"	326.00	386.50	60.50	
100	Aircraft	"	3,288.50	2,602.50		686.00
500	Lorillard Ins.	"	8,255.00	6,555.00		1,700.00
200	Canadian Pacific 6%	"	18,118.00	17,964.50		153.50 X
1500	Lorillard Ins.	"	20.465.00	19,552.50		912.50
500	General Realty	"	980.00	330.00		650.00
100	American Car & Fdy.	"	4,897.75	1,941.00		2,956.75
600	N.Y.Steam Corpn.	1931	32.100.00	30,178.59		1,921.41
500	Federated Stores	"	550.00	194.02		355.98
100	U.S.& Foreign Secur.	"	5,138.50	4,990.00		148.50
200	Natl. Union Radio	"	200.00	136.50		63.50
100	Spur Distilling	"	500.00	442.00		58.00
950	European Electric WTS.	1932	475.00	343.95		131.05
	Premiums & Brokerages	"	449.90			449.90
			682,436.48	683,194.75	21599.36	1841.09
			82,169,553.23 X	82,142,456.35 X	54,829.02	81,929.90 X
			21600533	21372933	27,096.88	80572.16
	NET LOSS					

THIS NET LOSS is taken against the PARTNERSHIP PROFITS from HINSON & NEUBERGER

25763

Findings of Fact and Opinion.

58

UNITED STATES BOARD OF TAX APPEALS.

HARRY H. NEUBERGER, PETITIONER, v. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 78919. Promulgated January 28, 1938.

1. Where a petitioner shares in partnership profits, which were derived by it from the sale of noncapital assets, he may not offset such share of profits by losses personally sustained in the sale of similar assets in computing his individual net taxable income.

2. Commissions paid upon the purchase and sale
59 of securities by one who is a trader in that business, are deductible as ordinary and necessary business expenses. Following *Winmill* v. *Commissioner*, ... Fed. (2d) ..., reversing the Board on this point.

W. H. Freidman, Esq., for the petitioner.

J. R. Johnston, Esq., for the respondent.

The respondent having determined a deficiency in income tax of $9,021.24 for the taxable year 1932, the petitioner brings this proceeding for the redetermination thereof, claiming error by reason of (a) the erroneous disallowance of a loss upon the sale of securities held less than two years
60 and, in the alternative, (b) the erroneous disallowance of taxes and commissions paid in connection with the purchase and sale of securities and, also in the alternative, (c) the erroneous disallowance of a loss of $327 sustained on a certain commodity transaction.

FINDINGS OF FACT.

The petitioner, an individual, resident of New York, New York, was a member of the New York Stock Exchange. He was engaged in the business of trading in securities on

the floor of the Exchange for the partnership of Hilson & 61
Neuberger, of which he was a member, executing orders on behalf of customers of the partnership and for his individual account.

During the taxable year the petitioner sustained a net loss, from his individual trading, from sales or exchanges of stocks and bonds which were not capital assets (as defined in section 101 of the Revenue Act of 1932), in the aggregate sum of $25,588.93. In computing such loss he deducted stock transfer taxes and commissions on sales of securities from the selling price and he added commissions paid upon the purchases of securities to the cost and treated them as a part of the cost of securities sold. Federal 62
and New York stock transfer taxes on such sales amounted to $2,779.69. Commissions paid during the year upon purchases and sales, respectively, were $2,133.63 and $2,306.98. These taxes and commissions—the latter having been paid to the aforesaid firm of Hilson & Neuberger and reported by it for income tax purposes in its return for that year—were not separately deducted in the petitioner's return for 1932.

The petitioner's firm derived a profit of $142,802.29 in the taxable year from the sale of stocks and other securities which were not capital assets of the type hereinbefore indicated. It had other income (including commissions received) of $170,830.65 and deductions of $203,981.78, or net 63
income of $109,651.06 [.16]. The petitioner's distributive share of said profits amounted to $36,000 of the first $94,000 and 45 percent of the remainder.

In addition to the above and foregoing the parties have stipulated the following:

> During the calendar year 1932, petitioner incurred a loss of $327 upon the sale of a grain futures contract held less than two years. This loss was disallowed by the Commissioner in the determination of the deficiency here involved, but is now conceded as

64 not being within the limitations set forth under Section 23 (r) of the Revenue Act of 1932, and this loss may now be allowed on the Rule 50 computation.

Petitioner's distributive share of the partnership profits for 1932 was increased by the Commissioner by $488.38, which item is not in dispute.

The petitioner now claims the right to deduct from taxable income for the year 1932, the aforesaid loss of $25,588.93 from individual trading in stocks and other securities, which deduction has been disallowed by the Commissioner; and in the alternative, the petitioner now claims the right to deduct the taxes and commissions referred to * * *.

65

OPINION.

ARNOLD: The first error complained of by the petitioner relates to a loss sustained by him, personally, in the disposition of securities which were not capital assets as defined in section 101 of the Revenue Act of 1932, disallowed by the respondent as an offset against, and in the reduction of, partnership profits, to which he was entitled, and which were derived by it from the sale of noncapital securities. This question is now well settled and must be resolved in favor of the respondent, upon the authority of *Percy H. Johnston*, 34 B. T. A. 276; affd. 86 Fed. (2d) 732; certiorari denied, 301 U. S. 683, and *Winmill* v. *Commissioner*, ... Fed. (2d) ... (Dec. 6, 1937), affirming the Board at 35 B. T. A. 804, on this point.

66

The respondent now concedes the petitioner's right to deduct stock transfer taxes paid by him to the Federal and State Governments during the taxable year, amounting to $2,779.69. So that the sole remaining question is whether or not the petitioner is entitled to deduct commissions paid upon purchases and sales of securities, as ordinary and necessary expenses incurred in his business as a trader in securities, under section 23 (a) of the Revenue Act of 1932,

or whether he must treat such commissions on the former as a part of cost and on the latter as an offset against the selling price, as provided in article 282 of Regulations 77, and prior regulations. This identical question was before us in *Robert C. Winmill*, 35 B. T. A. 804, wherein we sustained the action of the respondent under his regulations and denied the contention of the petitioner. In its opinion, upon appeal, the Second Circuit reversed the Board on this point, holding commissions paid on both purchases and sales, by one engaged as a trader in the business of buying and selling securities, to be ordinary and necessary business expenses, applying the same principles to a trader in securities as heretofore applied to other businesses in *Highlands Trust No. 1546*, 32 B. T. A. 760; also *Alexander Sprunt & Son, Inc.*, 64 Fed. (2d) 424; *Kornhauser* v. *United States*, 276 U. S. 145; and *Clarence Whitman*, 16 B. T. A. 197; affd. 49 Fed. (2d) 1087. The Board having failed to find, as a fact, whether or not the petitioner there was a trader in the business of buying and selling securities, the court remanded the proceeding for that purpose and directed that if so found such commissions should be allowed as deductions. Complying with the mandate of the court, the Board so found and entered its order on December 31, 1937, directing recomputations by deducting from taxable income the commissions upon purchases and sales of securities.

We have found, from the nature of the petitioner's business and the volume of transactions entered into by him, individually, that he was a trader in the business of buying and selling securities. This, it would seem, the respondent has never disputed.

The respondent's determination shall be modified accordingly.

Reviewed by the Board.

Judgment will be entered under Rule 50.

(Seal)

Decision.

70 UNITED STATES BOARD OF TAX APPEALS,

Washington.

Docket No. 78919.

HARRY H. NEUBERGER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

71

Pursuant to the Board's Findings of Fact and Opinion promulgated January 28, 1938, the respondent herein having on March 2, 1938 filed recomputation of tax and the petitioner having on March 5, 1938 filed an acquiescence in said recomputation, now therefore, it is

ORDERED AND DECIDED: That the petition herein respecting income tax liability for the year 1932 was filed March 28, 1935; that no claim for refund has been filed; that tax was paid in the amounts of $545.56 on March 15, 1933, $4,000.00 on February 16, 1937 and $3,000.00 on May 4,
72 1937, making a total tax paid of $7,545.56; that the true tax liability is $6,721.46; and therefore in accordance with Section 504 (a) of the Revenue Act of 1934 there is an overpayment of $824.10 for the year 1932.

Enter

(s) WILLIAM W. ARNOLD,
Member.

Entered March 9, 1938.
(Seal)

Petition for Review.

73

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Docket No. 78,919.

HARRY H. NEUBERGER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

74

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

NOW COMES Harry H. Neuberger, by his attorneys, WALTER MENDELSOHN and WILBUR H. FRIEDMAN, and respectfully shows:

I.

JURISDICTION.

75

This is a petition to review the judgment of the United States Board of Tax Appeals which was entered in the above entitled case on March 9, 1938. The petitioner is an individual residing within the Southern District of New York, and filed his 1932 income tax return (the one in question) with the Collector of Internal Revenue for the Second District of New York, whose office is also located within the Southern District.

Jurisdiction to review said decision of the Board is conferred upon this Court by §§1001, 1002 and 1003 of the Revenue Act of 1926, as amended.

76

II.

Nature of Controversy.

Petitioner filed a petition with the United States Board of Tax Appeals for review of a determination by the respondent of a deficiency in income taxes for the year 1932, in the amount of $9,021.24. Prior to the decision of the Board, petitioner paid a total tax of $7,545.56. The Board held that the true tax liability was $6,721.46, and therefore found an overpayment of $824.10.

The question involved is whether petitioner is entitled,
77 in the computation of his taxable income for the year 1932, to apply losses sustained by him in that year in the course of trading in stocks and securities held less than two years, against his distributive share of partnership income for the year 1932, which partnership income included gains realized in the course of trading in stocks and securities held less than two years. The amount of these gains exceeded his individual losses.

The Commissioner, relying upon §23(r) of the Revenue Act of 1932, held that this could not be done, and the Board, while deciding in favor of the taxpayer on other issues not herein involved, sustained the Commissioner.

The facts were stipulated before the Board. The essen-
78 tial facts are that during 1932, the petitioner trading in securities in his individual capacity, incurred a net loss of $25,558.93. During that year he was a member of a Stock Exchange partnership, which partnership also traded in securities. The trading, both for the partnership account and his own, was carried on by the petitioner. The partnership in 1932 sold securities held less than two years at a profit, of which petitioner's distributive share was in excess of $25,588.93, the amount of petitioner's individual trading losses.

The Board found as a fact that petitioner was a trader in the business of buying and selling securities. It is contended that the Board erred in failing to interpret §23(r) as being inapplicable to a trader in securities, at least under the facts of this case. 79

It is further contended that if §23(r) applies to a trader in securities, then that section is unconstitutional in that it is arbitrary and capricious, depriving petitioner of property without due process of law, in violation of the Fifth Amendment to the Federal Constitution. This is for the reasons, among others, that:

(1) §23(r), as interpreted by the Board, requires petitioner to report all his income from his partnership business of trading, but denies him the right to deduct therefrom a loss from his individual business of trading. 80

(2) §23(r), as interpreted by the Board, unreasonably discriminates between dealers in securities and persons trading in securities as a business.

(3) §23(r), as interpreted by the Board, unreasonably discriminates between sellers of (1) stocks and bonds held less than two years and (2) other speculative property held less than two years.

ASSIGNMENTS OF ERROR. 81

I. The Board erred in interpreting §23(r) of the Revenue Act of 1932 as denying to a member of a partnership the right to apply his individual loss from sales of stocks and securities held less than two years against his distributive share of partnership income resulting from similar sales where said member was in business of trading in securities and traded on the floor of the Stock Exchange both for his own account and the account of the partnership.

82 II. The Board erred in approving the determination of the Commissioner that the petitioner could not offset his individual security trading losses against his distributive share of the partnership's security trading profits.

III. The Board erred in failing to hold that §23(r), as interpreted by the Board, violates the due process clause of the Fifth Amendment.

IV. The Board erred in failing to hold that §23(r), as interpreted by the Board, violates the due process clause of the Fifth Amendment, in that it denies to taxpayer the right to deduct from his income earned in the business of
83 security trading a loss related to the same income and incurred in the same business.

V. The Board erred in failing to hold that §23(r), as interpreted by the Board, violates the due process clause of the Fifth Amendment, in that it unreasonably and capriciously discriminates between dealers in securities and persons in the business of trading in securities.

VI. The Board erred in failing to hold that §23(r), as interpreted by the Board, violates the due process clause of the Fifth Amendment in that it unreasonably and capri-
84 ciously discriminates between sellers of (1) stocks and bonds held less than two years and (2) other speculative property held less than two years.

VII. The Board erred in failing to find that there had been an overpayment in tax of $7,545.56.

WHEREFORE, the petitioner prays that the decision of the United States Board of Tax Appeals be reviewed by this Honorable Court, that a transcript of the record be prepared in accordance with law and transmitted to the

Clerk of said Court, and that appropriate action be taken 85
to the end that the errors complained of may be reviewed and corrected by this Honorable Court, and the decision of the said Board reversed.

WALTER MENDELSOHN
WILBUR H. FRIEDMAN
Counsel for Petitioner
11 Broadway
New York, N. Y.

State of New York,
County of New York—ss.: 86

HARRY H. NEUBERGER, being duly sworn, deposes and says: That he is the petitioner above-named; that he has read the foregoing petition, and is familiar with the contents thereof, and that said petition is true to his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters, he believes it to be true.

HARRY H. NEUBERGER.

Sworn to before me this
6th day of June, 1938. 87

C. L. FLUKE,
Notary.
Kings County Clerk's #186 etc.
Cert. filed in N. Y. County #630.
N. Y. County Register's #0F351.
My commission expires Mar. 30, 1940.
(Seal)

Praecipe.

88 UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

B. T. A. Docket No. 78,919.

HARRY H. NEUBERGER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

To the Clerk of the United States Board of Tax Appeals:

89 You will please prepare a transcript of record on petition for review in the above-entitled case for certification to the United States Circuit Court of Appeals for the Second Circuit, said transcript to include the following:

1. The docket entries of the proceedings before the United States Board of Tax Appeals in Docket No. 78,919.
2. The taxpayer's amended petition to the Board of Tax Appeals and respondent's answer thereto.
3. The stipulation of facts.
4. The findings of fact, opinion, and decision of the Board of Tax Appeals.

90 5. The petition for review.

6. The praecipe.

WALTER MENDELSOHN,
WILBUR H. FRIEDMAN,
Counsel for Petitioner,
11 Broadway,
New York, N. Y.

Receipt of copy of the foregoing praecipe is hereby acknowledged this 14 day of July, 1938.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Clerk's Certificate.

91

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

Docket No. 78919.

HARRY H. NEUBERGER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

92

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 33 inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 2nd day of August, 1938.

93

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.
(SEAL)

94 **Stipulation Consolidating Records.**

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 117.

HARRY NEUBERGER,

Petitioner,

v.

95 COMMISSIONER OF INTERNAL REVENUE,

Respondent.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

HARRY NEUBERGER,

Respondent.

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96 It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled proceedings that the record on appeal certified by the Clerk of the Board of Tax Appeals in connection with the petition for review filed by Harry H. Neuberger as petitioner and the record on appeal certified by the Clerk of the Board of Tax Appeals in connection with the petition for review filed by the Commissioner of Internal Revenue as petitioner, may be consolidated for printing; and that the printed record shall consist of the record on review certified by

the Clerk of the Board of Tax Appeals in connection with 97
the petition filed by Harry H. Neuberger, petitioner, plus the petition for review filed by the Commissioner of Internal Revenue, the notices of filing of petition for review filed by the Commissioner of Internal Revenue, the praecipe for record filed by the Commissioner of Internal Revenue, and this stipulation.

It is further stipulated that the cost of printing the record shall be shared equally by the parties to the above proceedings.

WILBUR H. FRIEDMAN,
Counsel for Harry H. Neuberger.

98

JAS. W. MORRIS,
Counsel for the Commissioner
of Internal Revenue.

So Ordered:

LEARNED HAND,
U. S. C. J.

March 27, 1939.

99

Petition for Review and Assignments of Error.

100

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

B. T. A. Docket No. 78919.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner on Review,

v.

101 HARRY H. NEUBERGER,
Respondent on Review.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

NOW COMES Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and J. R. Johnston and Albert E. Arent, Special Attorneys for the Bureau of Internal Revenue, and respectfully shows:

102

I

JURISDICTION.

The petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States of America, holding his office by virtue of the laws of the United States of America.

The respondent on review, Harry H. Neuberger (hereinafter referred to as the taxpayer), is an individual who 103
filed a return for Federal income taxes for the year 1932 with the United States Collector of Internal Revenue for the Second District of New York, whose office is within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1001, 1002, and 1003, of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, as amended by Section 1101 of the Revenue Act of 1932, as amended by Section 519 of the Revenue Act of 1934.

II 104

PRIOR PROCEEDINGS.

On March 4, 1935, a notice of deficiency was sent to the taxpayer by registered mail as provided in Title I of the Revenue Act of 1932, showing a deficiency in Federal income tax for the year 1932 in the amount of $9,021.24. An appeal from this determination was filed by the taxpayer with the United States Board of Tax Appeals on March 28, 1935. On April 26, 1935 the Commissioner filed an answer to the petition, in which certain allegations of the petition were admitted and others denied.

On February 15, 1937 the case was submitted on a stipu- 105
lation of facts to a division of the Board of Tax Appeals at New York, New York. At the same time the taxpayer filed an amended petition. On January 7, 1938 the respondent was granted leave to file an answer to said amended petition.

On January 28, 1938 the Board promulgated its findings of fact and opinion and, pursuant thereto, entered its decision on March 9, 1938, ordering and deciding that there is an overpayment of $824.10 for the year 1932.

106

III.

Nature of the Controversy.

The question presented on this appeal is whether petitioner is entitled to deduct commissions paid upon purchases and sales of securities as ordinary and necessary expenses incurred in his business as a "trader" in securities, under Section 23(a) of the Revenue Act of 1932. The Commissioner contends, in accordance with Article 282 of Regulations 77, that commissions paid upon purchases of securities by one who is not a dealer in securities
107 are a part of the cost and are not deductible as business expenses, and that commissions paid upon sales of securities are an offset against the selling price and are likewise not deductible as business expenses. The Board has held that commissions in the amounts of $2,133.63 and $2,306.98 paid upon purchases and sales of securities, respectively, may be deducted by the taxpayer, a "trader" in the business of buying and selling securities.

IV.

Assignments of Error.

108 The Commissioner says that manifest errors occurred and intervened to his prejudice in the opinion, decision, and final order of redetermination rendered and entered by the Board of Tax Appeals, and assigns the following errors, each of which he avers occurred in said opinion, decision, and final order of redetermination, and upon which he relies as grounds for reversing the said decision and final order of redetermination, to wit:

1. The Board of Tax Appeals erred in holding and deciding that commissions paid upon purchases of securities by one engaged as a trader in the busi-

ness of buying and selling securities are deductible as ordinary and necessary business expenses, under Section 23(a) of the Revenue Act of 1932. 109

2. The Board of Tax Appeals erred in holding and deciding that commissions paid upon sales of securities by one engaged as a trader in the business of buying and selling securities are deductible as ordinary and necessary business expenses, under Section 23(a) of the Revenue Act of 1932.

3. The Board of Tax Appeals erred in failing to hold and decide that commissions paid upon purchases of securities by one engaged as a trader, and not as a dealer, in the business of buying and selling securities are part of the cost of said securities, as provided in Article 282 of Regulations 77 and prior regulations, and are not deductible as ordinary and necessary expenses incurred in a trade or business. 110

4. The Board of Tax Appeals erred in failing to hold and decide that commissions paid on sales of securities by one engaged as a trader, and not as a dealer, in the business of buying and selling securities are an offset against the selling price, as provided in Article 282 of Regulations 77 and prior regulations, and are not deductible as ordinary and necessary expenses incurred in a trade or business. 111

5. The Board of Tax Appeals erred in holding and deciding that the amounts of $2,133.63 and $2,306.98, paid by the taxpayer during the year 1932 as commissions upon purchases and sales of securities, respectively, should be deducted from gross income in determining the taxpayer's income tax liability for the year 1932.

6. The Board of Tax Appeals erred in ordering and deciding that the taxpayer's true tax liability

112 for the year 1932 is $6,721.46 and that there is an overpayment for said year in the amount of $824.10.

7. The Board of Tax Appeals erred in failing to order and decide that there is a deficiency in income taxes owed by the taxpayer for the year 1932, as determined by the Commissioner, rather than an overpayment.

WHEREFORE, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance
113 with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) JAMES W. MORRIS,
Assistant Attorney General.

(Signed) J. P. WENCHEL,
R. L. W.

J. P. WENCHEL,
Chief Counsel,
114 Bureau of Internal Revenue.

Of Counsel:
J. R. JOHNSTON,
ALBERT E. ARENT,
Special Attorneys,
Bureau of Internal Revenue.

United States of America,
District of Columbia—ss.: 115

ALBERT E. ARENT, being duly sworn, says that he is a special attorney of the Bureau of Internal Revenue, and as such is duly authorized to verify the above and foregoing petition for review to the United States Circuit Court of Appeals for the Second Circuit; that he has read the said petition for review and is familiar with the statements therein contained, and that he knows of his own knowledge that the facts therein stated are true, except such facts as may be stated on information and belief, and those facts he believes to be true.

116

(s) ALBERT E. ARENT,
Special Attorney,
Bureau of Internal Revenue.

Sworn to and subscribed before me this
28th day of May, 1938.

(s) GEORGE W. KREIS.
Notary Public,
District of Columbia.
My Commission expires Nov. 15, 1942.

117

Notice of Filing Petition for Review.

118 IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

B. T. A. Docket No. 78919.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner on Review,

v.

HARRY H. NEUBERGER,
Respondent on Review.

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119 To:

Mr. Harry H. Neuberger,
c/o Proskauer, Rose & Paskus,
11 Broadway,
New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 31st day of May, 1938, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-
120 entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 31st day of May, 1938.

(Signed) J. P. WENCHEL
R L W

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 2nd day of June, 1938. 121

(Sd) HARRY H. NEUBERGER,
Respondent on Review.

Notice of Filing Petition for Review.

IN THE 122

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

B. T. A. Docket No. 78919.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner on Review,

v.

HARRY H. NEUBERGER,
Respondent on Review. 123

To:

Walter Mendelsohn, Esq., and
Wilbur H. Friedman, Esq.,
11 Broadway,
New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 31st day of May, 1938, file with the Clerk of the United States Board of Tax Appeals, at

Notice of Filing Petition for Review.

124 Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 31st day of May, 1938.

(Signed) J. P. WENCHEL
R L W

125 J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 2nd day of June, 1938.

(Sd) WALTER MENDELSOHN,

.....

126 Attorneys for Respondent on Review.

Praecipe for Record.

127

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Docket No. 78919.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

HARRY H. NEUBERGER,
Respondent. 128

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

129

1. Docket entries of proceedings before the Board.

2. Pleadings before the Board:

   (a) Amended Petition, including annexed copy of deficiency letter and statement thereto attached.

   (b) Answer to Amended Petition, filed and allowed January 5, 1938.

Praecipe for Record.

130

3. Stipulation of facts dated February 15, 1937, and filed at the hearing.

4. Findings of fact, opinion and decision of the Board.

5. Petition for review filed by the Commissioner, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

6. This praecipe.

131

(Signed) J. P. WENCHEL
R L W
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby acknowledged this 11th day of July, 1938.

WILBUR H. FRIEDMAN,
Attorney for Respondent.

132

Clerk's Certificate.

133

UNITED STATES BOARD OF TAX APPEALS.

WASHINGTON.

Docket No. 78919.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

HARRY H. NEUBERGER,

Respondent.

134

I, B. D. GAMBLE, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 34 to 44, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the cross appeal as above numbered and entitled, and as agreed upon by the parties.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 8th day 135
of ~~April, 1939~~. August, 1938.

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

(Seal)

[fol. 46] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 117. October Term, 1938.

Argued May 26, 1939. Decided June 12, 1939

HARRY H. NEUBERGER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

HARRY H. NEUBERGER, Respondent

Appeal from the Board of Tax Appeals

Before Swan, Chase, and Patterson, Circuit Judges

Both the taxpayer and the commissioner seek review of a decision of the Board determining the income tax liability of Harry H. Neuberger for the year 1932. Modified.

For the opinion below see 37 B. T. A. 223.

Proskauer, Rose & Paskus, of New York City (Walter Mendelsohn, Wilbur H. Friedman, and Martin Norr, all of New York City, of counsel), for taxpayer.

James W. Morris, Asst. Atty. Gen., and Sewall Key and F. E. Youngman, Sp. Assts. to Atty. Gen. for the Commissioner.

Per CURIAM:

During the year 1932 the taxpayer, who was a member of the New York Stock Exchange, was engaged in the business of trading in securities on the floor of the Exchange for a partnership of which he was a member and also for his individual account. The taxpayer's petition presents two questions: (1) whether a loss sustained by him during the year on his individual transactions in stocks and bonds which were non-capital assets as defined in section 101 of

the Revenue Act of 1932, 26 U. S. C. A. § 101 note, may be offset against his share of partnership profits realized during the same period from sales or exchanges of similar non-capital assets; and (2) whether section 23(r) of the 1932 Act, 26 U. S. C. A. § 23 note, if construed to prevent such offsetting, as the Board held it did, is unconstitutional. Both questions must be answered in the negative upon the authority of prior decisions by this court. Johnston v. Commissioner, 2 Cir., 86 F. 2d 732, certiorari denied 301 U. S. 683, 57 S. Ct. 784, 81 L. Ed. 1341; Davis v. United States, 2 Cir., 87 F. 2d 323, certiorari denied 301 U. S. 704, 57 S. Ct. 937, 81 L. Ed. 1350.

The commissioner's petition likewise presents two questions, one relating to commissions paid on the purchase of securities, the other to commissions paid on the sale of securities. Relying upon this court's decision in Winmill v. [fol. 47] Commissioner, 2 Cir., 93 F. 2d 494, the Board held that both commissions on purchases and commissions on sales may be deducted as ordinary and necessary business expenses. Subsequently the Winmill case was reversed with respect to commissions on purchases; they must be treated as part of the cost of the securities purchased. Helvering v. Winmill, 305 U. S. 79, 59 S. Ct. 45, 83 L. Ed. —. The fact that such commissions were paid to the taxpayer's partnership and reflected in its income does not change their character as capital expenditures by the taxpayer. To conform to the ruling of the Supreme Court, the deduction of commissions on purchases must be disallowed. With respect to commissions on sales we adhere to our decision in the Winmill case.

The cause is remanded for modification of the Board's order in conformity with this opinion.

[fol. 48] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 117

HARRY H. NEUBERGER, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

against

HARRY H. NEUBERGER, Respondent

(Consolidated Cases.)

On Cross-Petitions for Review of Decision of the United States Board of Tax Appeals

TAXPAYER'S PETITION FOR REARGUMENT

This petition is filed for the reason that the Court's per curiam opinion rendered June 12, 1939, fails to cover vital points presented in taxpayer's argument. As to the purchase commissions, the Court's opinion makes new and unjust law without discussion.

[fol. 49] I

The 1938 Act

The question whether § 23(r) prevents deduction of individual trading losses in this case is one of Congressional intent. The Court disposes of the point by citing the Johnston case.

In the first general Revenue Law since the Johnston case, Congress made it clear that it disagreed with this Court's finding as to its intention.

Accordingly, the Johnston case is no longer authority on the point, and taxpayer submits that this Court should set forth its reasons for disregarding Congress' own statement as to its intention.

The per curiam opinion fails to mention the 1938 Act.

II

The Applicable Decisions

Both the Supreme Court in Jordan v. Roche and the Sixth Circuit in the Coulby case, in situations identical with the present, held that the later Act (here the 1938 Act) controls as to the intention of Congress.

Upon the oral argument, counsel requested the Court to discuss these cases in order that, if this Court were unwilling to take the responsibility of overruling the Johnston case, the way might be laid for review by the Supreme Court [fol. 50] on the basis of conflict with its decision and the decision of another Circuit.

The per curiam opinion fails to mention either one of these decisions.

III

The Constitutional Question

The Davis case is entirely different from the present case. That case dealt with a casual investor; taxpayer here was in the business of trading in securities. This difference appears both from a reading of the Davis opinion, which carefully leaves the field open for a case like the present, and from statements made from the bench in this and other cases. The per curiam opinion follows the Davis case without discussion. The taxpayer would seem entitled to be told why the Court has broadened the Davis case to cover this one, contrary to the opinion in that case.

IV

The taxpayer should be allowed to deduct 45% of the purchase commissions.

On this point the Court's opinion reaches an extremely harsh result. The taxpayer paid purchase commissions to his partnership; the partnership reported these commissions in its income; 45% of the commissions were distributed to petitioner and included by him in his taxable income.

The Court holds that, since the Supreme Court's decision in the Winmill case requires purchase commissions to be [fol. 51] capitalized, they are not deductible even though 45% of them is reflected in petitioner's income.

There is no authority for this view. The Winmill case did not deal with such a situation.

What happened in this case was no different from a transfer by an individual of money from his own bank account to a joint bank account. Would the Court sanction an income tax on such a transfer?

The Court says that the character of the capital expenditure is not changed by the fact that it was paid to taxpayer's partnership. Of course it was changed. It was changed, because to the extent of 45% it was paid back to taxpayer, and therefore to that extent was no longer a capital expenditure. To that extent, it was not an expenditure at all.

At least on this point, the taxpayer would seem entitled to relief from the startlingly unjust result arrived at by the Court.

Conclusion

Taxpayer should be given an opportunity to reargue the questions discussed above. To afford the taxpayer a basis for applying to the Supreme Court for certiorari, this Court should set forth its reasons for disregarding the 1938 Act, Jordan v. Roche and the Coulby case, and the grounds upon which the Davis case is here extended to a different situation.

[fol. 52] In any event, the taxpayer respectfully requests reconsideration of the decision as to the deductibility of the 45% of the purchase commissions paid by him and on which he has already been taxed.

Respectfully submitted,

Proskauer, Rose & Paskus, Counsel for Taxpayer.
Walter Mendelsohn, Wilbur H. Friedman, Martin Norr, of Counsel.

[fol. 53] CERTIFICATE OF COUNSEL

STATE OF NEW YORK,
County of New York, ss:

Walter Mendelsohn, being duly sworn, deposes and says:

I am a member of the firm of Proskauer, Rose & Paskus, counsel for petitioner herein, and am familiar with the facts of this case.

I hereby certify that the foregoing petition for a rehearing is not made for the purpose of delay. The petition is filed in

good faith in the belief that substantial ground for rehearing exists.

Walter Mendelsohn.

Sworn to before me this 22nd day of June, 1939. Marcia C. Morse, Notary Public. N. Y. Co. Clk's. No. 246, Reg. No. 0M346. My Commission expires March 30, 1940. (Seal.)

[fol. 54] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRY H. NEUBERGER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

HARRY H. NEUBERGER, Respondent

Before Swan, Chase and Patterson, Circuit Judges.

PETITION FOR REHEARING

Proskauer, Rose & Paskus, Attorneys for taxpayer; Walter Mendelsohn, Wilbur H. Friedman and Martin Norr, of counsel.

Per CURIAM:

The petition for rehearing is denied.

Jun. 28, 1939.

——, ——, C. J. J.

[fol. 55] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United

States Courthouse in the City of New York, on the 28th day of June, one thousand nine hundred and thirty-nine.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Robert P. Patterson, Circuit Judges.

HARRY H. NEUBERGER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

HARRY H. NEUBERGER, Respondent

A petition for a rehearing having been filed herein by counsel for the taxpayer.

Upon consideration thereof, it is ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 56] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Harry H. Neuberger, vs. Commissioner of Internal Revenue. Order. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 28, 1939. William Parkin, Clerk.

[fol. 57] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of June, one thousand nine hundred and thirty-nine.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Robert P. Patterson, Circuit Judges.

HARRY H. NEUBERGER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

HARRY H. NEUBERGER, Respondent

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is modified in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 58] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Harry H. Neuberger, vs. Commissioner of Internal Revenue (and cross appeal). Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 29, 1939. William Parkin, Clerk.

[fol. 59] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 58, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Harry H. Neuberger, Petitioner, vs. Commissioner of Internal Revenue, Respondent; Commissioner of Internal Revenue, Petitioner, vs. Harry H. Neuberger, Respondent, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this second day of November, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the said United States the one hundred and sixty-fourth.

D. E. Roberts, Clerk. (Seal.)

[fol. 60] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1939

No. —

HARRY H. NEUBERGER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT OF CERTIORARI

On consideration of the motion of counsel for petitioner in the above entitled case, and good cause therefor having been shown, it is now hereby ordered that the time within which a petition for a writ of certiorari may be filed herein be, and the same is hereby extended for a period of 60 days from this date.

Dated this 26th day of September, 1939.

Harlan F. Stone, Justice of the Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—May 27, 1940

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

A petition for rehearing having been submitted in this case;

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari entered January 2, 1940, be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted, limited to the second and third questions thereby presented.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.